To Act Or Not To Act: Will New York's Defeated Death Penalty Be Resurrected?

Diana N. Huffman

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TO ACT OR NOT TO ACT: WILL NEW YORK’S DEFEATED DEATH PENALTY BE RESURRECTED?

Diana N. Huffman

Introduction ................................................... 1140
I. The Rise and Fall of New York’s Death Penalty Statute ................................................. 1141
   A. Supreme Court Jurisprudence on Capital Punishment ........................................ 1142
   B. New York’s 1995 Statute in Light of Supreme Court Mandates .............................. 1144
   C. The Jury’s Role in New York Capital Trials ...... 1146
   D. The Anticipatory Deadlock Provision ............. 1147
   E. New York’s Death Penalty Found Unconstitutional ................................... 1149
      1. People v. LaValle ................................ 1149
      2. People v. Taylor ............................... 1150
   F. Legislative Action Post-LaValle ................... 1153
II. Options for the New York State Legislature .......... 1155
   A. Statutory Amendment ............................. 1156
      1. Elements of a Valid Jury Deadlock Instruction ..................................... 1156
      2. Four Possible Reformulations of New York’s Deadlock Provision ...................... 1157
         a. Option 1 .................................. 1157
         b. Option 2 .................................. 1159
         c. Option 3 .................................. 1159
         d. Option 4 .................................. 1161
   B. Abolishing the Death Penalty in New York ...... 1163
      1. National Trends ............................... 1163
      2. Arguments For and Against Abolishing New York’s Death Penalty .................... 1166
      3. Does Death Deter? ............................ 1167
      4. Incapacitation and the Availability of Life Imprisonment Without Parole .......... 1173
      5. An Expensive System .......................... 1174
      6. Disparate Patterns of Prosecution .......... 1176
      7. Questions of Innocence ....................... 1178
      8. Methods of Execution .......................... 1179
INTRODUCTION

Capital punishment has always been a topic of controversy in the United States. The debate about the death penalty, its value as a way to permanently incapacitate society’s most dangerous criminals and its effectiveness as a deterrent to violent crime, has increased over the last three years. This phenomenon is particularly visible in New York State where, in 2004, the New York Court of Appeals struck down the State’s death penalty statute as invalid under the New York Constitution.\footnote{See People v. LaValle, 817 N.E.2d 341 (N.Y. 2004).} Three years later, in People v. Taylor,\footnote{878 N.E.2d 969 (N.Y. 2007).} the Court reiterated its prohibition on the use of capital punishment under the current statute and overturned the death sentence of the last man on New York’s death row.\footnote{See Alan Feuer, Murderer’s Sentence Tossed Out, N.Y. TIMES, Oct. 24, 2007, at B3.} New York’s death row is now empty and the Capital Defender Office, established in 1995 when the death penalty statute was enacted, has closed.\footnote{See Marnie Eisenstadt, 10 Years Later: Death Penalty on the Books, off the Agenda, POST-STANDARD (Syracuse, N.Y.), Sept. 25, 2005, at A1; Joel Stashenko, Capital Defender Readies to Shut Doors, N.Y.L.J., Oct. 29, 2007, at col. 4 [hereinafter Stashenko, Capital Defender]; Joel Stashenko, Court of Appeals to Hear Last Pending Death Case: Outcome Could Be Affected by Addition of Two New Judges, N.Y.L.J., Sept. 10, 2007, at S1 [hereinafter Stashenko, Court of Appeals]. The Capital Defender Office is a state agency “established under New York State’s death penalty statute and was given the statutory mandate of ensuring that defendants who cannot afford...}
People v. LaValle will continue unless the state legislature amends the death penalty statute to cure the constitutional defects identified by the Court of Appeals.

What is the future of capital punishment in New York? In 2008, the question of whether the New York State Legislature will address the LaValle and Taylor decisions by either amending or repealing the death penalty statute remains unresolved. This Note describes the evolution of New York’s 1995 death penalty statute, analyzes the way in which the state legislature could respond to the statute’s unconstitutionality, and recommends that the legislature end the current debate over the future of capital punishment in New York by abolishing the death penalty.

Part I describes the evolution of death penalty legislation at the federal level and within New York State. It focuses on the structure of New York’s death penalty, examines its statutory provisions, and then explores the Court of Appeals’ reasons for declaring the statute unconstitutional. Part I further discusses the legislative reaction to the statute’s invalidation and describes the current debate in New York about the continued desirability of capital punishment. Part II presents the legislative alternatives of either amending or abolishing New York’s death penalty statute and discusses the arguments for and against each option. Finally, Part III argues that despite the challenges involved in either amending or reinstating the death penalty or abolishing it, the legislature should not allow the statute simply to remain inoperable by default. This Note concludes that given the need for action, the State Legislature should move to abolish the death penalty in New York.

I. THE RISE AND FALL OF NEW YORK’S DEATH PENALTY STATUTE

This Part examines the history and development of New York’s death penalty statute: first, introducing the requirements established by the Supreme Court for a constitutional capital punishment scheme; then, examining the structure of New York’s death penalty statute.
penalty statute in light of Supreme Court jurisprudence. This Part also reviews the New York Court of Appeals’ decision invalidating the statute as violating the state constitution; and finally, describes the legislative reaction to this de jure moratorium on capital punishment in New York.

A. Supreme Court Jurisprudence on Capital Punishment

The U.S. Supreme Court’s regulation of capital punishment began with the 1972 landmark case, *Furman v. Georgia*, in which the Court found unfettered capital sentencing discretion unconstitutional. By failing to provide safeguards against arbitrary sentencing decisions, capital punishment statutes like Georgia’s violated the Eighth and Fourteenth Amendments. *Furman* invalidated all death penalty statutes as they existed in the United States in 1972, initiating a nationwide four-year moratorium on capital punishment.

The moratorium ended in 1976 with *Gregg v. Georgia*, when the Supreme Court upheld Georgia’s newly-enacted capital sentencing scheme. Specifically, the Court found that the Georgia statute satisfied the constitutional mandate identified in *Furman*: to withstand Eighth Amendment scrutiny, a capital punishment statute must provide “clear and objective” standards for determining death-eligibility.

Importantly, in *Gregg*, the Court expressly rejected the rigid categorization of death as cruel and unusual punishment. Prior to *Gregg*, the Supreme Court had addressed the constitutionality of

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10. As the Court explained in *Gregg*, the Eighth Amendment requires procedural safeguards to prevent against “arbitrary and capricious” decision-making. See *Gregg*, 428 U.S. at 189, 193; Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (“[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty . . . . It must channel the sentencer’s discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death.”) (internal citations omitted).
specific capital punishment regimes and had often “assumed and asserted the constitutionality of capital punishment.”\textsuperscript{12} Not until \textit{Gregg}, however, did the Court explicitly state that the death penalty “does not invariably violate the Constitution.”\textsuperscript{13} This clarification was critical in reviving capital punishment nationwide. In fact, since 1972, thirty-seven states have reinstated the death penalty,\textsuperscript{14} crafting capital sentencing statutes to comply with the requirements articulated by the Supreme Court in \textit{Furman, Gregg,} and their progeny.\textsuperscript{15}

Over the past forty years, the Supreme Court has established clear guidelines for state legislation of a legal and constitutional death penalty regime. In decisions following \textit{Furman}, the Supreme Court identified two features necessary for a constitutional capital sentencing scheme: first, a method to narrow the class of offenders eligible for the death penalty,\textsuperscript{16} and second, an individualized sentencing determination based on consideration of the particular defendant’s character, record, and circumstances.\textsuperscript{17} Although state death penalty statutes differ on certain points, each uses a two-step process whereby the sentencer makes a factual determination of

\begin{itemize}
  \item \textsuperscript{12} Id. at 169.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{16} Statutory aggravating circumstances are used in many states, such as New York, to guide sentencing discretion. According to the Supreme Court, “an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” \textit{Zant v. Stephens}, 462 U.S. 862, 877 (1983).
  \item \textsuperscript{17} \textit{See Woodson v. North Carolina}, 428 U.S. 280, 303-04 (1976) (finding mandatory death penalty statute unconstitutional because sentencer was not allowed to consider the defendant’s character and record).
\end{itemize}
the defendant’s death-eligibility, followed by a discretionary determination of the appropriate punishment.18

B. New York’s 1995 Statute in Light of Supreme Court Mandates

On March 7, 1995, New York State enacted a death penalty statute authorizing capital punishment for thirteen categories of intentional murder.19 Capital trials in New York are conducted in two stages.20 First, the jury must decide whether the defendant is guilty of first degree murder.21 New York’s death penalty statute, section 400.27 of the New York Criminal Procedure Law (“CPL”),22 “narrows” the class of death-eligible defendants by requiring that, in the guilt phase of a capital trial, the jury find at least one statutory aggravating factor established beyond a reasonable doubt.23 The burden of proof rests with the government and the jury must agree unanimously on each aggravating factor.24

After a defendant is convicted of first degree murder, the trial court conducts a separate sentencing proceeding with the same jury that determined the defendant’s guilt.25 The government may seek a capital sentence only if it has filed timely notice of intent.26

18. See Gregg, 428 U.S. at 193.
21. First degree murder is defined by N.Y. PENAL LAW § 125.27 (McKinney 2003).
22. N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2004).
23. See id. § 400.27(7)(b). Aggravating factors are listed in N.Y. PENAL LAW § 125.27(1)(a) (McKinney 2004). The Supreme Court has approved “[t]he use of ‘aggravating circumstances’ . . . [as] a means of . . . narrowing the class of death-eligible persons.” Lowenfield v. Phelps, 484 U.S. 234, 244-45 (1988).
24. See § 400.27(7)(b).
25. Also referred to as the “penalty phase.”
26. See N.Y. CRIM. PROC. LAW § 400.27(1) (McKinney 2004). But see id. § 400.27(2) (listing exceptions to impaneling same jury). A jury trial cannot be waived in a New York capital case. See N.Y. CONST. art. I, § 2 (“A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death.”); see also N.Y. CRIM. PROC. LAW § 320.10(1) (McKinney 1974).
27. See N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 1995). The government has limited time in which to seek a capital trial: it must file a written notice of intent
The government can withdraw this notice at any time. Individualized sentencing is accomplished in New York capital cases through the presentation and consideration of the mitigating circumstances of the crime and the individual character of the defendant. In New York, capital sentencing authority rests with the jury, who must choose to sentence a defendant convicted of first degree murder to either death or life imprisonment without parole. The jury makes this sentencing decision by weighing the aggravating factors established in the trial’s guilt phase and the mitigating factors that each juror finds that the defendant proved by a preponderance of the evidence.

Furthermore, a death sentence may be imposed only if the jury agrees unanimously that: first, the aggravating factors “substantially outweigh” the mitigating factors beyond a reasonable doubt, and second, that death is the appropriate sentence. New York affords a capital defendant additional protection by allowing the jury to elect not to impose the death penalty even if the jury finds that the aggravating factors substantially outweigh the mitigating factors. If the jury’s sentencing resolution is unanimous, to seek the death penalty within 120 days of the defendant’s arraignment on an indictment charging him with first-degree murder.

28. See § 400.27(1) (“Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case . . . .”).
29. See id. § 400.27(9) (listing mitigating factors for jurors to consider; subsection (f) allows introduction of any potentially mitigating evidence); see also Lockett v. Ohio, 438 U.S. 586, 604 (1978) (“[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”); Jurek v. Texas, 428 U.S. 262, 271 (1976) (“A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. . . . [T]o meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.”).
30. § 400.27(1); N.Y. PENAL LAW § 70.00(5) (McKinney 2007) (“Life imprisonment without parole. Notwithstanding any other provision of law, a defendant sentenced to life imprisonment without parole shall not be or become eligible for parole or conditional release.”).
31. See N.Y. CRIM. PROC. LAW § 400.27(3) (McKinney 2004).
32. At sentencing, the defendant may present evidence towards establishing the existence of any mitigating factor he wishes the jury to consider. See § 400.27(9).
33. Each juror can decide for himself whether and which mitigating factors have been established, regardless of what his fellow jurors find. See id. § 400.27(11).
34. See id. § 400.27(6); see also Girolamo supra note 19, at 122-23.
35. See § 400.27(11)(a).
36. Id.
37. See id. § 470.30(3).
the court must impose that decision. If the jury is unable to agree on a sentence, however, the judge must impose a statutorily-dictated sentence. All death sentences are subject to mandatory and automatic direct review by the New York Court of Appeals. Any sentence imposed “under the influence of passion, prejudice, or any other arbitrary or legally impermissible factor” will be overturned.

C. The Jury’s Role In New York Capital Trials

The importance of fairness and reliability in New York’s capital sentencing scheme is perhaps best seen in the role of the jury. States vary in the degree of responsibility they allocate to the judge and jury in capital cases. New York is among the majority of death penalty states who vest capital sentencing authority in the jury. In fact, in New York capital cases a jury trial is mandatory and the jury makes both the factual and evaluative determinations.

Although the U.S. Supreme Court has decided that jury sentencing in a capital case is not constitutionally required, the Court has conceded the “important societal function” of jury verdicts. Namely, the jury verdict provides a “significant and reliable objec-

38. See id. § 470.27(11). The jury must submit to the court a written report with its sentencing determination, the mitigating factors each juror found established, and all mitigating and aggravating factors considered in deliberations. See id. § 400.27(11)(b); N.Y. COMP. CODES R. & REGS. tit. 22, § 218.2 (2008).
39. See N.Y. CRIM PROC. LAW § 470.27(11)(d) (McKinney 2004) (stating that if a jury finds unanimously for death, the court shall impose the death penalty); id. § 470.27(11)(e) (McKinney 2004) (stating that if a jury finds unanimously for life imprisonment without the possibility of parole, the court shall impose that sentence). But see id. § 330 (describing the circumstances in which the court may set aside a death sentence).
40. See id. § 400.27(11)(c).
41. See id. § 450.70(1).
42. Id. § 470.30(3)(a).
44. See, e.g., Ring v. Arizona, 536 U.S. 584, 608 n.6 (2002).
45. By finding aggravating factors in the guilt phase.
46. By finding mitigating circumstances in the penalty phase.
47. In New York, the “criminal jury is more than a finder of fact; it is a microcosm of democratic government.” Matthew Tulchin, An Analysis of the Development of the Jury’s Role in a New York Criminal Trial, 13 J.L. & POL’y 425, 490 (2005).
49. Id.
2008] NEW YORK’S DEFEATED DEATH PENALTY 1147
tive index of contemporary values” and reflects the “conscience of the community.” The provisions of New York’s 1995 statute mandating jury sentencing in capital cases and further conditioning a death sentence on unanimous jury approval underscores the New York capital jury’s important role as the ultimate arbiter of death.

D. The Anticipatory Deadlock Provision

To further the goal of reliable jury verdicts in capital cases, the New York statute provides additional due process protections through enhanced sentencing information. New York is one of only eight states to require that before a capital jury begins sentencing deliberations the trial court must instruct the jury on the consequences of deadlock.

According to the Supreme Court, the Eighth Amendment does not require a jury instruction on the consequences of deadlock.

50. Gregg v. Georgia, 428 U.S. 153, 181 (1976). “Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.” Id. at 184.

51. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968); see also Atkins v. Virginia, 536 U.S. 304, 324 (2002) (Rehnquist, J., dissenting) (“[I]ndividual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.”).

52. See N.Y. Const. art. I, § 2 (“A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death.”); see also N.Y. Crim. Proc. Law § 320.10(1) (McKinney 1974).


54. Jones v. United States, 527 U.S. 373, 382 (1999) (“[I]n a capital sentencing proceeding, the Government has ‘a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.’” (quoting Lowenfield v. Phelps, 484 U.S. 231, 238 (1988))).


57. See Jones v. United States, 527 U.S. 373, 381-82 (1999). “We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that ‘[t]he very object of the jury system is to secure
The New York Court of Appeals, however, has rejected this federal construction as a matter of state constitutional law, finding it “unfaithful” to the “heightened standard of reliability” required by the due process clause of the New York Constitution. As the Supreme Court has itself observed, the finality of a death sentence renders such punishment “qualitatively different from a sentence of imprisonment, however long.” New York’s practice of providing capital jurors with all information relevant to the sentencing process is based on the “qualitative difference” of a death sentence and the consequent need for reliable sentencing decisions.

New York’s anticipatory deadlock instruction, however, is unique. New York trial courts must inform capital jurors that if the jury is unable to reach a unanimous sentencing decision, the court will impose a sentence of life imprisonment, with the possibility of parole after the defendant has served a minimum of twenty to twenty-five years. This outcome, where jury deadlock results in a sentence more lenient than either sentence available for jury consideration, does not exist in any other states’ anticipatory deadlock scheme. In fact, in 2004 the New York Court of Appeals identified this unique deadlock instruction as a flaw in New York’s death penalty statute.

unanimity by a comparison of views, and by arguments among the jurors themselves.” Id. at 382 (quoting Allen v. United States, 164 U.S. 492, 501 (1896)); see also Laurie B. Berberich, Jury Instructions Regarding Deadlock in Capital Sentencing, 29 Hofstra L. Rev. 1301, 1311-16 (2001).


59. LaValle, 817 N.E.2d at 365.


61. See Gregg v. Georgia, 428 U.S. 153, 204 (1976) (finding “it desirable for the jury to have as much information before it as possible when it makes the sentencing decision”): LaValle, 817 N.E.2d at 365.

62. Woodson, 428 U.S. at 305; Taylor, 878 N.E.2d at 983 (citing LaValle, 817 N.E.2d at 366) (recognizing the “irrevocable [sic] nature of capital punishment as well as the concomitant need for greater certainty in the outcome of capital jury sentences”).


64. See LaValle, 817 N.E.2d at 357.

65. § 400.27(10).

66. See LaValle, 817 N.E.2d at 357; Berberich, supra note 57, at 1327-28; see also § 400.27(10).

67. LaValle, 817 N.E.2d at 357.
E. New York’s Death Penalty Found Unconstitutional

1. People v. LaValle

In 1997, Stephen LaValle raped and stabbed a Suffolk County school teacher to death with a screwdriver. A jury found LaValle guilty of first-degree murder and sentenced him to death. On review, in a four-to-three decision, the New York Court of Appeals upheld LaValle’s conviction but vacated his death sentence. The court held that section 400.27(10)’s deadlock instruction violates the New York Constitution’s due process clause. By informing jurors that failure to reach unanimous agreement will result in the defendant’s release from prison in as little as twenty years, the anticipatory deadlock instruction forces jurors to factor the defendant’s future dangerousness into their sentencing decision. Future dangerousness is not a statutory aggravating factor for a capital jury to consider under New York penal law. Section 400.27(10) therefore creates “an unconstitutionally palpable risk” that a member of a potentially-deadlocked jury, who would otherwise vote for life without parole, will vote for death, not because of an individualized determination that the prisoner deserves death, but to prevent the defendant from receiving a parole-eligible deadlock sentence.

The LaValle court declared that in order for New York’s capital punishment statute to be functional, the State Legislature must en-
act amending legislation. Until such amendment, all first-degree murder prosecutions must proceed as non-capital cases. Capital punishment is effectively on hold in New York pending legislative action to amend or repeal the statute.

2. People v. Taylor

Despite the New York Court of Appeals’s 2004 decision invalidating New York’s death penalty, in 2007, one man, John Taylor, remained on New York’s death row. On May 24, 2000, Taylor and accomplice Craig Godineaux robbed a Wendy’s restaurant in Queens, New York. They shot five people to death and injured two more. Taylor was held personally responsible for killing two of the victims and liable for the deaths of the three others whom he ordered his accomplice to kill. The jury convicted Taylor of twenty counts of murder, including six counts of first degree murder.

Before jury selection, Taylor moved to strike his death penalty notice, arguing that New York’s death penalty statute was unconstitutional because the deadlock instruction deprived him of due process. The trial judge, Steven W. Fisher, denied the motion, citing Taylor’s failure to overcome beyond a reasonable doubt the presumptive validity of a legislative statute. Fisher also refused to instruct the jury that upon deadlock he would sentence Taylor to 175 years with no possibility of release from prison. Judge Fisher did, however, modify the deadlock instruction by adding to the jury charge:

heat six [counts] of first degree murder, and the two counts of first degree attempted murder on which you have convicted the

77. Id. at 367.
78. Id.
79. Feuer, supra note 3.
82. Taylor, 747 N.Y.S.2d at 320. On January 22, 2001, Godineaux pleaded guilty to each count of the indictment in which he was named, and on February 21, 2001, he was sentenced to life imprisonment without parole. Id. at 320 n.2.
84. See N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2004).
87. See Taylor, 878 N.E.2d at 974.
defendant, are precisely the type of crimes that almost always induce a judge to give the maximum sentence permissible.

. . . [T]he maximum sentence I could give and would almost certainly impose in this case, would be a sentence of 175 years to life . . . .

The jury sentenced Taylor to death on three counts of first degree murder and Taylor appealed his conviction and sentence. Taylor was the sixth and final death sentence under the 1995 statute heard by the Court of Appeals.

Taylor submitted his appeal on the premise that any death sentence based on the statute found unconstitutional in LaValle was similarly defective. Prosecutors from the Queens County District Attorney’s Office responded that the Court of Appeals could distinguish Taylor from LaValle because Judge Fisher’s jury charge had cured the anticipatory deadlock instruction defect identified in LaValle. Upholding Taylor’s death sentence, prosecutors argued, would not overrule LaValle but rather “clarify” that the death penalty statute is not unconstitutional as applied in all cases. The prosecution asked the Court to admit that it had gone “too far” in finding the statute’s deadlock provision unconstitutional and inseverable from the rest of the statute.

On review, the Court of Appeals refused to “condone a trial court’s remaking of an unconstitutional statute.” Although Taylor’s death sentence pre-dated the LaValle decision, the statute under which Taylor was sentenced had been determined facially unconstitutional and non-severable. Thus, the deadlock provision was immune to judicial reformulation. The Court further observed that the deadlock instruction given in Taylor created its own problems of “non-neutrality” because the trial court injected its opinion as to the weight of the mitigating circumstances into the

88. Id. at 975 (emphasis added).
89. See id. at 974.
91. See Perrotta, supra note 85; see also O’Donnell, supra note 81.
92. See Robert Gavin, Case Stirs Death Debate: Proceeding Headed for State’s Highest Court Offers Possibility of Execution, TIMES UNION (Albany), Sept. 9, 2007, at A1; Perrotta, supra note 85; see also O’Donnell, supra note 81.
94. Id.
96. See id. at 978.
sentencing instruction. Judge Fisher’s instruction that the crimes committed by Taylor were “precisely the type . . . [that] induce a judge to give the maximum sentence permissible” signaled to the jury that, in the judge’s personal opinion, the defendant merited no leniency. By telling the jury that upon deadlock, he would probably impose a sentence of more than 175 years, Judge Fisher could be interpreted as telling the jury “they too should give the maximum sentence permissible—death.” Members of a capital jury who likely have never served on a trial, let alone a capital case, and tend to lack legal training, will naturally be influenced by and defer to what they perceive to be the judge’s expertise. The Court of Appeals noted that Judge Fisher’s instruction failed to present the jury with the balanced and neutral sentencing information that is particularly necessary when a defendant’s life is at stake.

For these reasons, on October 23, 2007, the Court of Appeals upheld People v. LaValle, reiterating LaValle’s central holding: the current anticipatory deadlock provision of CPL section 400.27(10) is invalid under the New York State Constitution’s Due Process Clause, and this unconstitutional provision cannot be severed from the statute. The Court vacated Taylor’s death sentence and remanded the case to the trial court for resentencing.

97. See id. at 983 n.22.
98. See id.
99. See id.
100. See id.
101. See generally id. Taylor, like LaValle, was a four-to-three decision. Judge Carmen Beauchamp Ciparick, who authored the Taylor majority opinion and Chief Judge Judith Kaye, reaffirmed their support for the LaValle decision. They were joined by Judge Theodore T. Jones, who was nominated by Governor Elliott Spitzer and replaced Judge George Bundy Smith in February 2007. Judge Robert Smith, a dissenter in LaValle, concurred with the Taylor decision on the principle of stare decisis. The two remaining dissenters from LaValle, Judges Susan Read and Victoria Graffeo, dissented in Taylor, along with Eugene F. Pigott Jr., who was nominated by former-Governor George Pataki and joined the Court in September 2006, replacing Albert Rosenblatt. Both George Bundy Smith and Rosenblatt were members of the majority in LaValle and majority voters in each of the Court of Appeals’ capital cases vacating the death sentence. See New York Court of Appeals, Judges of the Court, available at http://www.courts.state.ny.us/ctapps/judges.htm.
102. See Taylor, 878 N.E.2d at 976-78.
103. See id. at 977; see also id. at 982 (“In LaValle . . . the invalid portion of the statute was inextricably interwoven with the sentencing procedure and necessary to effectuate the Legislature’s intent. . . . [A]ny attempt to sever the offending portion of the statute would result in a ‘misshapen fragment of the original’ drafted by a court’s impermissible use of a legislative pen.”).
Taylor has been resentenced to life imprisonment without parole.  

F. Legislative Action Post-LaValle

Critics of the LaValle and Taylor decisions characterized the Court of Appeals as intruding into the legislative realm of policymaking. Specifically, they accused the Court of using these cases to “advance a liberal agenda” and injecting into its decisions “personal anti-death penalty ideologies.” Others said the Court had properly confined itself to the task of legal interpretation, leaving law-making to the legislature. In Taylor, the Court reiterated LaValle’s message: the legislature can resurrect the death penalty in New York through statutory amendment. Despite “reservations” as to the Court’s willingness to approve any amended version of the death penalty, the senate resolved to “take corrective action” in hopes of restoring the death penalty in New York.

Accordingly, in 2004 and again in 2005, the State Senate, conceding the defeat of the death penalty statute in its current

105. See John Caher, Senate Republicans Blast Court as Activist, N.Y.L.J., Mar. 2, 2005, at col. 4. (“’I personally believe the Court of Appeals looked desperately to find something’ on which to reverse the death sentence, said Senator Dale M. Volker, a Republican from the Buffalo area and longtime champion of capital punishment.”).
108. People v. Taylor, 878 N.E.2d 969, 984-85 (N.Y. 2007) (noting that passing an amended statute “is easy to do if the Legislature wants to do it”).
109. Caher, supra note 105
110. Id.
111. Senate Bill 7720, passed in Senate on August 11, 2004, expired without an assembly vote. See N.Y. CRIM. PROC. LAW. § 400.27 (McKinney 2007) (Practice Commentaries).
112. On February 25, 2005, Senate Bill 7720 was reintroduced as Senate Bill 2727 and passed in the Senate on March 9, 2005 in a vote of 37-22. See JOSEPH LENTOL ET AL., supra note 19, at 56 n.67; see also Russell G. Murphy, People v. Cahill: Domestic Violence and the Death Penalty Debate in New York, 68 ALB. L. REV. 1029, 1049 n.79 (2005) [hereinafter Murphy, Cahill]. Senate Bill 2727’s anticipatory deadlock instruction gives jurors three sentencing options for individuals guilty of first degree murder: death, life without parole, or life imprisonment with parole eligibility after a minimum of 20 years, with a deadlock sentence of life without parole. See JOSEPH LENTOL ET AL., supra note 19, at 56.
form, introduced legislation to amend the statute’s sentencing provisions. Although various amendments to section 400.27(10) have passed in the Senate, none have gained approval in the Assembly. This failure to reinstate the death penalty indicates a change in political support among New Yorkers since 1995. The judicially-imposed moratorium on capital punishment in New York allowed the state legislature and general populace to consider whether capital punishment remains a viable and desirable punishment. Recent developments suggest that the majority of New Yorkers are loath to reinstate capital punishment.

From December 15, 2004 to February 11, 2005, the New York Assembly Standing Committees on Codes, Judiciary and Correction held five public hearings in New York City and Albany. The hearings discussed whether the state legislature should amend the death penalty statute to restore capital punishment in New York. Eighty-seven percent of the witnesses who testified at the

114. Even Senator Dale Volker, who helped draft the 1995 law and supports efforts to restore the death penalty in New York, admitted defeat when he described the Taylor decision as the “last nail in the coffin” for the death penalty statute. See Stashenko, supra note 108.

115. See, e.g., notes 112-13 & 122 and accompanying text.

116. In New York’s 1994 gubernatorial campaign, Republican candidate George Pataki, running against death penalty opponent Mario Cuomo, promised that if elected, his first priority would be the passage of a death penalty bill. See Ian Fisher, The 1994 Campaign: Issues; Clamor over Death Penalty Dominates Debate on Crime, N.Y. TIMES, Oct. 9, 1994, at A.45. However, by February 15, 2006, a public opinion poll by the New York Times indicated that public support for Governor Pataki had “dropped to its lowest level since his first year as governor a decade ago.” Michael Slackman & Marjorie Connelly, Pataki’s Ratings Decline Sharply in Poll of State, N.Y. TIMES, Feb. 15, 2005, at A1. This poll also suggested that “attitudes [had] shift[ed] against death penalty.” Id. According to the poll, 56 percent of registered voters surveyed said they preferred either life in prison without parole or life in prison with the possibility of parole over the death penalty for people convicted of murder. Only 34 percent said they supported the death penalty, a significant drop from the 47 percent who supported it in 1994, when Mr. Pataki made instituting the death penalty a critical component of his successful drive to unseat Gov. Mario M. Cuomo. Id.


118. See generally JOSEPH LENTOL ET AL., supra note 19.

119. Assembly Speaker Sheldon Silver explained that after the LaValle court struck down the death penalty, “we in the Legislature faced an important choice: act quickly or act deliberately. We chose the latter option and conducted a series of extraordinary public hearings to solicit the widest possible range of views on the death penalty in New York before deciding what action, if any, to take with respect to the statute.” Press Release, N.Y. State Assembly, supra note 117; see also Murphy, Cahill, supra note 113, at 1049.
2008] NEW YORK'S DEFEATED DEATH PENALTY 1155

hearings opposed restoring the death penalty in New York, some favoring outright abolition. Accordingly, following the hearings, the assembly rejected senate-sponsored legislation to amend CPL section 400.27. Nothing has changed in New York in the past few years to indicate that the legislature is any more likely now to reinstate the death penalty than it was in 2004.

II. OPTIONS FOR THE NEW YORK STATE LEGISLATURE

The Taylor decision means that the state of affairs established by the LaValle ruling continues in New York: because a deadlock instruction is statutorily mandated and the current deadlock instruction is constitutionally prohibited, capital punishment may not be implemented in its current form. Rather than allow a statute to remain on the books, unconstitutional and inoperable, the New York State Legislature could decide to take one of two actions: amend the statute to address the constitutional infirmities that the Court of Appeals identified in LaValle and Taylor, or affirmatively abolish the death penalty. This section discusses considerations relevant to each option.

120. See Murphy, Cahill, supra note 113, at 1049; see generally Joseph Lentol et al., supra note 19.

121. See supra note 113 (discussing S.B. 2727, 2007 Leg. 230 Legis. Sess. (N.Y. 2007)).


123. As Judge Smith observed in People v. Taylor, “nothing else of significance has changed. No one suggests that any development in the last three years, either in the law or the law's effect on the community, has changed the context in which LaValle was decided.” People v. Taylor, 878 N.E.2d 969, 984 (N.Y. 2007).

124. See N.Y. CRIM. PROC. LAW § 400.27(10) (McKinney 2004).

125. See People v. LaValle, 817 N.E.2d 341, 359 (N.Y. 2004) (“We hold today that the deadlock instruction required by CPL 400.27(10) is unconstitutional under the State constitution because of the unacceptable risk that it may result in a coercive, and thus arbitrary and unreliable, sentence.”). The Taylor court held that New York's Due Process Clause requires that “jurors be informed of the consequences of their actions.” Taylor, 878 N.E.2d at 977 (citing LaValle, 817 N.E.2d at 367).

126. See Taylor, 878 N.E.2d at 977-78.
A. Statutory Amendment

Although the New York State Assembly has thus far not been receptive towards statutory amendment, should its stance change, it is important to identify the reconstructed sentencing provision most likely to pass scrutiny with the Court of Appeals. Because there is not just one form that an amendment could take, the following sections review the elements required for a valid jury instruction in a capital case and then discuss potential reformulations of CPL section 400.27 that could satisfy these requirements.

1. Elements of a Valid Jury Deadlock Instruction

Any amendment to New York’s capital punishment statute must incorporate several features in order to pass judicial scrutiny, both at the state and federal level.

First, in New York, an anticipatory deadlock instruction must be part of any constitutional death penalty scheme. The Court of Appeals in Taylor neatly summarized the characteristics necessary for an amended deadlock provision: “a non-coercive sentencing statute that properly informs the jury of the consequences of their actions.”

Eighth Amendment jurisprudence, as applied to an anticipatory deadlock provision, requires that jurors receive accurate and unambiguous information. Otherwise, jurors might speculate about the consequences of deadlock, which diminishes the reliability of the jury’s verdict.

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127. See supra Part I.F.

128. The idea for this section is based on a paper by Jonathan D. Zimet presented to the New York State Assembly Codes Committee as part of the 2004-2005 public hearings discussed above in Part I.D. See generally Jonathan D. Zimet, Finding a Valid Deadlock Instruction in New York after LaValle, 41 CRIM. L. BULL. 2 (2005). In discussing and evaluating various approaches that the Legislature might take in amending the statute, this section assumes that under any construction of the deadlock instruction, the trial court will deliver those instructions in a neutral and accurate manner.

129. When the LaValle court pronounced Section 400.27(10) of the New York Criminal Procedure Law unconstitutional, it also stated “the absence of any instruction is no better than the current instruction.” LaValle, 817 N.E.2d at 365. “Like the flawed deadlock instruction, the absence of an instruction would lead to death sentences that are based on speculation, as the Legislature apparently feared when it decided to prescribe the instruction.” Id.

130. Taylor, 878 N.E.2d at 979 (emphasis added).

131. See J. Mark Lane, Is There Life Without Parole?, 26 LOY. L.A. L. REV. 327, 358 (1993). The U.S. Supreme Court has held that “accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never have made a sentencing decision.” Gregg v. Georgia, 428 U.S. 153, 190 (1976).

132. See LaValle, 817 N.E.2d at 365-67.
Moreover, the deadlock instruction must not, in form or substance, coerce a jury decision in any particular way. Most jurors lack the experience and legal knowledge necessary for understanding the substance and procedure of sentencing without guidance. Jurors naturally look to the judge for such guidance. The sentencing instruction must therefore offer a balanced and neutral perspective to avoid influencing the jury decision.

A revised deadlock instruction must also avoid the coercive influence seen in the current version of CPL section 400.27 where the deadlock sentence is one which the sentencing jury cannot choose and “might [not] even . . . consider[ ] palatable.” As discussed above, this provision could engender fear amongst jurors that deadlock will result in a parole-eligible sentence. A revised deadlock instruction can thus avoid coercion by including the deadlock sentence as one of the jury’s sentencing options.

2. Four Possible Reformulations of New York’s Deadlock Provision

This section proposes four ways of amending New York’s deadlock instruction. The advantages and drawbacks of each proposal are analyzed in light of the judicial requirements and legislative considerations discussed above.

a. Option 1

One possible reformulation (“Option 1”) of New York’s deadlock provision gives the jury two sentencing options, death or life without parole, and informs the jury that upon deadlock the trial court will sentence the defendant to life without parole. The
Court of Appeals approved this option in both LaValle and Taylor as an acceptable method of legislative amendment.\textsuperscript{142} By allowing the jury to impose the deadlock sentence during sentencing and providing that deadlock will not lead to the defendant’s release, this option removes the potential for coercion.\textsuperscript{143} If the jury is divided in deliberations, no juror will feel pressured to alter his vote simply to avoid deadlock. For a juror who favors life without parole, the deadlock sentence is the sentence he prefers. Similarly, a juror who favors death will not change his vote simply to reach unanimity. Whether he surrenders his vote and sides with jurors favoring life without parole or waits for deadlock the sentence will be the same. Rather than alter his position, this option encourages a death-prone member of a potentially deadlocked jury to engage his colleagues in dialogue in an attempt to persuade them of his views.\textsuperscript{144} This open debate among jurors in sentencing deliberations is the very goal of jury-sentencing: that the ultimate outcome of jury deliberations should reflect the views of the community.\textsuperscript{145}

One shortcoming of Option 1 is that the deadlock sentence fails to accord the defendant as much leniency as jurors or the legislature might desire. New York’s current deadlock provision reveals a legislative intent that if the jury fails to agree on either of the harsher sentences of death or life without parole, the defendant should receive a third, more lenient sentence. On the other hand, the legislature only intended for jurors to have two sentencing op-

\textsuperscript{142} See People v. Taylor, 878 N.E.2d 969, 979 (N.Y. 2007) (stating that legislative correction, “may be as simple as enacting a sentencing statute that provides for life without parole if the jury cannot unanimously agree on death”); see also id. at 984 (“LaValle reads the Constitution to require an anticipatory deadlock instruction telling the jurors, in substance, that the consequence of a hung jury will be life without parole.”); People v. Cahill, 809 N.E.2d 561, 603 (N.Y. 2003) (“The only constitutionally proper sentence for a judge to impose upon the failure of the jury to decide between death and life imprisonment without parole is the lesser sentence considered by the jury-life imprisonment without parole. Such a result ensures that the jury’s verdict expresses the true conscience of the community and is not the result of uncertainty or coercion.”) (Smith, J., concurring).

\textsuperscript{143} LaValle, 817 N.E.2d at 364 n.19.

\textsuperscript{144} See Reply Brief for Defendant-Appellant at 150, LaValle, 817 N.E.2d 341 (N.Y. 2004) (No. 71), 2004 WL 1352004, at *150.

\textsuperscript{145} Jones v. United States, 527 U.S. 373, 382 (1999).

\textsuperscript{146} Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).
NEW YORK’S DEFEATED DEATH PENALTY

2008

NEW YORK’S DEFEATED DEATH PENALTY

The Court of Appeals has indicated that where the jury is only allowed two options, the deadlock sentence should be the same as the alternative to death.

b. Option 2

A second way that the legislature could amend the anticipatory deadlock provision ("Option 2") is to give the jury three sentencing options, death, life without parole, and life with parole-eligibility, and inform the jury that upon deadlock the trial court will impose a parole-eligible life sentence.

Option 2 improves upon CPL section 400.27(10) in two ways. First, the deadlock sentence is one which the jurors themselves can choose. Second, this formulation retains a parole-eligible deadlock sentence, which conforms with the intent reflected in CPL section 400.27(10) that if the jury fails to agree unanimously on a sentence, the defendant should receive the most lenient sentence.

Nevertheless, Option 2 remains coercive. If the jury vote is split between death and life without parole, Option 2 might cause jurors in favor of the lesser sentence to change their vote to the harsher sentence to avoid a parole-eligible deadlock sentence.

c. Option 3

A third way to reconstruct New York’s capital sentencing instruction ("Option 3") is to allow the jury the three sentencing alternatives of death, life without parole, and life with parole eligibility, with the provision that upon deadlock the court will sentence the defendant to life without parole.

Option 3 avoids the problems seen in the current statute in two ways. It allows the jury to choose a parole-eligible sentence, and also does not coerce a verdict. Jurors can decide whether the de-

147. See Cahill, 809 N.E.2d at 600 n.8. “[T]he legislative history clearly shows that the legislators intended that the jury consider only the options of death and life without parole, while disregarding the sentence of life with parole, which was solely within the realm of the trial judge’s power.” Id.

fendant merits parole, but need not fear that deadlock will trigger parole-eligibility.

A problem with Option 3, however, arises when the jury is split: eleven jurors favoring a parole-eligible sentence and the remaining juror in favor of either life without parole or death. In this situation, one holdout juror can effectively impose a sentence that the majority of jurors found too harsh. If the government fails to convince all twelve jurors that the defendant merits life without parole, the legislature might see no reason for imposing this sentence upon deadlock. CPL section 400.27(10) mandates a lower deadlock sentence than even the jury could impose, indicating a legislative intent to construe deadlock in the defendant’s favor. Although the U.S. Supreme Court does “not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved,”149 if the New York State Legislature’s original intent of leniency remains, the deadlock sentence in any reconstructed sentencing provision should not be greater than the minimum sentence the jury considers.

Furthermore, the eleven-to-one dynamic discussed above may pose due process problems. If the deadlock sentence is the greater of the two sentences between which jurors are split, the ultimate sentence will not reflect an individualized determination of the appropriate punishment. The Supreme Court says that as long as a jury finds facts150 warranting a certain range of sentences, the judge can impose a sentence within that approved range.151 Under Option 3, however, the deadlock sentence is not based on the judge’s personal determination, but on an automatic statutory provision. Therefore, in certain circumstances Option 3 mandates a sentence of life without parole even though the majority of jurors found sufficient mitigating evidence to warrant a parole-eligible sentence. The Supreme Court might not find fault with Option 3, since the automatic sentence here is life without parole, not death.152

150. For example, aggravating circumstances.
152. Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (finding mandatory death penalty statute unconstitutional because sentencer was not allowed to consider the defendant’s character and record); see Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circum-
without parole, however, is a permanent deprivation of liberty, and the New York Court of Appeals avowedly construes the protections of the state’s due process clause more broadly than those of its federal counterpart. The Court of Appeals might therefore decide that the Option 3 deadlock scheme violates the state’s due process requirement of an individualized sentencing determination.

d. Option 4

New York’s anticipatory deadlock provision could be reformulated in a fourth way (“Option 4”) in an effort to more closely represent the will of the jury and with it, the will of society. Option 4 could amend CPL section 400.27(10) to create three sentencing choices, death, life without parole, and parole eligibility, and instruct the jury that upon deadlock the trial court will either impose a sentence of life without parole or life with parole eligibility. This deadlock sentence would depend on the results the jury reports to the court in a special verdict form.

Whether the deadlock sentence is life without parole or life with parole eligibility would depend on which sentence receives more votes. Because New York’s capital punishment scheme prohibits a death sentence unsupported by a unanimous jury vote, any vote for death would be treated under Option 4’s deadlock provision as a vote for life without parole. Under this scheme, the deadlock sentence is life without parole any time that the combined votes for death and life without parole outweigh those for parole eligibility. In the rare case that votes are evenly split between death and parole eligibility or the total votes for death and life without parole equal the number of votes for parole eligibility, the judge will impose a parole-eligible deadlock sentence. The rationale of Option 4 is to construe deadlock in favor of the defendant. CPL section 22-5.3

stances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

154. See supra notes 50-51 and accompanying text.
155. See generally Zimet, supra note 128.
156. The jury will submit to the court a special verdict form detailing each juror’s final vote and the factors she considered in reaching this determination. Special verdict forms are used in capital trials in Alabama, Georgia, Oregon, and Utah. Id. “In Utah, if the jury deadlocks between life without parole and parole-eligible life, the court is required to sentence the defendant to parole-eligible life, unless ten or more jurors voted for life without parole.” Id. at n.122 (citing UTAH CODE ANN. § 76-3-207(5)(c) (West 2008)).
400.27(10) shows that the New York State Legislature intended the deadlock sentence to benefit the defendant. It is only fair that where jurors cannot reach unanimous agreement, the defendant should receive the least severe of all sentencing options.

The advantage of the method provided by Option 4 is that jurors have a non-coerced, individual vote and are encouraged to vote according to their own judgment because they know that their vote will count in the end. No juror will surrender her personal assessment of the appropriate sentence because the only way to ensure that the sentence she favors is applied, whether in sentencing or upon deadlock, is to vote for it. The ultimate sentence imposed will be no greater than that considered by the jury, and this sentencing structure ensures that the sentence properly reflects the jury’s intent.

Option 4, however, invites juror speculation. In the pre-sentencing instructions, the trial court will not be able to definitively tell the jury which sentence the defendant will receive if the jury deadlocks. This uncertainty among jurors when deliberating might render the ultimate verdict unreliable.157

Furthermore, the very absence of a “coercive” influence in Option 4 increases the probability of deadlock. Under Option 4, jurors entering the sentencing phase of a capital trial know that if they cannot agree the court will simply impose the sentence for which the majority of jurors vote. Allowing jurors to impose a verdict simply by failing to reach unanimity “dilute[s] the voting power of the minority.”158 Jurors in the majority, aware that unanimity is not necessary for their vote to prevail, will feel little need to engage in full sentencing deliberations. A deadlock sentence that effectively allows the majority to dictate the deadlock sentence “stifles debate and renders some juror’s votes meaningless.”159 The sentencing scheme of Option 4 may discourage a capital jury from considering and fully discussing all sentencing opinions. A jury’s potential failure to “engag[e] in thorough consideration of

157. See id.

158. Tulchin, supra note 47, at 491. While Tulchin advocates against allowing the use of majority verdicts in New York criminal trials, his discussion of non-unanimity is relevant to the above formulation of a deadlock sentence because by informing the jury that if they fail to unanimously agree, the court will impose the verdict rendered by the majority, it effectively permits the jury to circumvent the unanimity requirement as laid out in Criminal Procedure Law section 400.27(11).

159. Id. at 491-92 (“[S]tudies have . . . shown that jurors in trial requiring [only] a majority verdict do not listen to or respect each other’s views as much as in cases requiring unanimous verdicts.”).
the evidence and legal issues presented at trial increases the likelihood that the verdict returned by the jury upon deadlock is neither accurate nor reliable.

B. Abolishing the Death Penalty in New York

The LaValle and Taylor decisions increased the already active and emotional debate in New York regarding the death penalty. The emotional appeal of the death penalty was seen in New York’s 1994 gubernatorial election in which George Pataki beat incumbent Governor Mario Cuomo in part through his promise that if elected he would sign a death penalty bill into law. The tide of popular opinion within New York, however, has turned since 1995. This was particularly evident at the 2004-2005 public hearings where 148 of the 170 people who testified objected to the death penalty. Indeed, rather than simply allow the death penalty statute to remain nonfunctional, the legislature could follow New Jersey’s example by affirmatively abolishing the death penalty.

1. National Trends

New York is not the only state to question the wisdom of capital punishment. The intense controversy over capital punishment, marked by increasing doubts about its application and administration, is seen nationwide. Concerns of innocence, arbitrariness, and racial and socioeconomic biases in capital sentencing have caused state lawmakers to propose modifications to their capital punishment laws, impose moratoriums, or abolish the death penalty. In January 2006, the New Jersey Legislature placed a statewide moratorium on capital punishment and appointed a commission to investigate and evaluate the effectiveness of New Jersey’s death penalty.

160. Id.


162. The de jure moratorium on capital punishment imposed by LaValle led New Yorkers to question whether the statute is worth resurrecting. See generally JOSEPH LENTOL ET AL., supra note 19. R


164. See supra text accompanying note 116. R

165. JOSEPH LENTOL ET AL., supra note 19, at 3. R

penalty statute.\textsuperscript{167} The commission reported that twelve of its thirteen members recommended abolishing the death penalty\textsuperscript{168} and replacing it with a life sentence without the possibility of parole.\textsuperscript{169} New Jersey formally abolished the death penalty on December 17, 2007.\textsuperscript{170}

Although no other state has gone so far towards abolition as New Jersey, several states have recently reconsidered the merits of capital punishment and imposing the death penalty less often.\textsuperscript{171} This trend, which death penalty scholar Jeffrey Kirchmeier terms the “moratorium movement,”\textsuperscript{172} is reflected in states imposing moratoriums on capital punishment,\textsuperscript{173} creating death penalty study commissions,\textsuperscript{174} and advancing abolitionist measures.\textsuperscript{175}


\textsuperscript{168} By abolishing the death penalty, New Jersey would be the first state to do so in over thirty years. See Laura Mansnerus, Panel Seeks End to Death Penalty for New Jersey, N.Y. Times, Jan. 3, 2007, at A1. In 1982, ten years after the U.S. Supreme Court halted executions nationwide, New Jersey reinstated capital punishment. Id. No executions took place under New Jersey’s 1982 death penalty statute. Peter G. Verniero, Appealed to Death, N.Y. Times, Jan. 14, 2007, at 14NJ.

\textsuperscript{169} See M. William Howard et al., New Jersey Death Penalty Study Commission Report 56 (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf. In its Report, the New Jersey Death Penalty Study Commission found that “[t]here is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.” Id. at 24. In fact, the Commission decided that “[t]he alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.” Id. at 56.


\textsuperscript{171} See Robert Tanner, Death Sentences In 2006 Fall To Lowest Level In 30 Years, Lawrence J.-World (Lawrence, Kan.), Jan. 5, 2007, available at http://www2.ljworld.com/news/2007/jan/05/death_sentences_2006_fall_lowest_level_30_years/ (“The number of death sentences handed out in the United States dropped in 2006 to the lowest level since capital punishment was reinstated 30 years ago.”).

\textsuperscript{172} See generally Jeffrey L. Kirchmeier, Another Place Beyond Here: The Death Penalty Moratorium Movement In The United States, 73 U. Colo. L. Rev. 1 (2002). This movement is not necessarily abolition-oriented; “many in the modern movement only desire a moratorium on executions in order to attempt to fix the problems.” Id. at 21.

\textsuperscript{173} As seen in New Jersey and Illinois.

\textsuperscript{174} Colorado, Montana, Nebraska, New Mexico and North Carolina state Legislatures have created death penalty study commissions or advanced abolition measures. A Divergent Path: A Death Penalty Shutdown, but Not in Texas, Dallas Morning News, Apr. 15, 2007, at 2P. Tennessee plans to create a commission to study the state’s death penalty statute. See Death Penalty Info. Ctr., Tennessee Legislature Overwhelmingly Approves Death Penalty Study (2007) (on file with author). Pennsylvania has convened a commission of judges, prosecutors, defense attorneys, law
For example, in 2000, then-Governor George Ryan ordered a
moratorium on all state executions, noting that while Illinois had
executed only twelve death row prisoners since the 1977 reinstatement
of the death penalty in Illinois, thirteen had been exonerated. Governor Ryan appointed a commission to study Illinois’
dead penalty system and recommend reform. Before he left
office in 2003, Ryan pardoned four prisoners facing execution and
commuted the death sentences of the remaining 167 inmates on
death row. The Illinois commission concluded that abolishing
the death penalty is the only way to prevent executing innocent
people. Illinois is currently in its eighth year of moratorium on
state executions.

enforcement officers and victims’ advocates to study the causes of wrongful convic-

175. Over the past year, at least twelve other states considered legislation to repeal
the death penalty. In February 2007, the Montana Senate gave preliminary approval
to a bill abolishing the death penalty. See Gregg Sangillo, Death and Innocence,
penalty in Nebraska failed in the state’s judiciary committee by one vote. Similarly
legislation to abolish Maryland’s death penalty lost in a tied Senate Committee vote.
See id.; DEATH PENALTY INFO. CTR., LAW ENFORCEMENT OFFICIALS GATHER IN MARYLAND
TO OPPOSE DEATH PENALTY, http://www.deathpenaltyinfo.org/article.php?did=2209 (last
visited Sept. 22, 2008) (on file with author). Furthermore, in 2008, bills to abolish
the death penalty or impose a moratorium on executions were introduced in Alabama,
Connecticut, Maryland, Nebraska, and Virginia. See DEATH PENALTY INFO. CTR.,

176. Greta Proctor, Reevaluating Capital Punishment: The Fallacy of a Foolproof
System, the Focus on Reform, and the International Factor, 42 GONZ. L. REV. 211, 223
(2007) [hereinafter Proctor, Reevaluating].

177. Although the death penalty commission provided the Illinois Legislature with
eighty-five suggestions for reforming the death penalty statute, none of these recom-
mended changes were enacted. Id.

178. Id.

179. Testimony Regarding the Future of Capital Punishment in New York State
Before the New York State Assembly Comms. on Codes, Judiciary, and Corrections,
Civil Liberties Union), available at http://www.nyclu.org/node/831 [hereinafter
Testimony].
2. Arguments For and Against Abolishing New York’s Death Penalty

Some accept or reject capital punishment for moral reasons. Retributivists cite religious and philosophical arguments to show that the worst criminals deserve the most severe penalty, death. But retaliation and revenge are inimical to the public in a free and democratic society. The Supreme Court rejects “retribution as a permissible goal of punishment.” Rather, the Court promotes deterrence, general and individualized, and incapacitation as just capital punishment objectives. Examination of the efficacy, efficiency, and expedience of capital punishment is therefore important in deciding New York policy on the death penalty. Considerations informing this debate include: capital punishment’s effectiveness as a deterrent to murder, interests in the permanent incapacitation of the most violent criminals, the expenses stemming from capital prosecution, the disparate application of the death penalty within New York State, the humanity of different methods of execution, and the possibility of executing an innocent person.


183. Id. at 344.

184. See id. at 343 (citing Trop v. Dulles, 356 U.S. 86, 111 (1958)).

185. See, e.g., Adam Liptak, Does Death Penalty Save Lives? A New Debate, N.Y. TIMES, Nov. 18, 2007, at 1 [hereinafter Liptak, Does Death Penalty Save Lives?] (“For the first time in a generation, the question of whether the death penalty deters murders has captured the attention of scholars in law and economics, setting off an intense new debate about one of the central justifications for capital punishment.”).

186. See infra Part II.B.3.


188. See infra Part II.B.5.

189. See infra Part III.E.1.

190. See infra Part III.E.4.

191. See infra Part III.E.3.
3. Does Death Deter?

For more than three decades, academics have struggled to determine whether capital punishment actually deters future murders.\(^{192}\) An especially relevant question in New York\(^{193}\) is whether capital punishment is more successful than life without parole as a deterrent to violent crime.\(^{194}\) The question of deterrence is really one of “marginal deterrence:” whether, all else being equal, the presence and use of capital punishment deters more homicides than the “next most severe” punishment of life imprisonment without the possibility of parole.\(^{195}\) The answer to this question is relevant for states deciding capital punishment policy.\(^{196}\) Evidence that capital executions deter violent crimes and therefore save innocent lives can counter moral concerns that state-imposed killing is unethical and unjustified.\(^{197}\)

Even if New York does not resurrect a full-fledged death penalty statute, some people argue that we should preserve death to punish the worst offenders like terrorists and cop killers.\(^{198}\) In 2005, the senate introduced legislation to enact capital punishment for criminals who kill police officers.\(^{199}\) Supporting the bill, then-Governor Pataki hoped to ensure that such criminals “face the maximum penalties.”\(^{200}\) The idea is not just one of retribution and permanent incapacitation, but of “deter[ring] criminals from killing

193. In New York, first degree murder prosecutions under the death penalty statute, section 400.27 of the Criminal Procedure Law, currently have a maximum penalty of life without parole. People v. LaValle, 817 N.E.2d 341, 356 (N.Y. 2004).
195. Perry, supra note 7, at 891 n.68 (quoting Robert Weisberg, The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny, 1 ANN. REV. L. & SOC. SCI. 151, 152 (2005)).
198. Press Release, Joseph L. Bruno, N.Y. State Senate, Senate Calls on Governor, Assembly to Enact Death Penalty Bill (Apr. 25, 2007), available at http://senate.state.ny.us/pressreleases.nsf/a9c64cb05dda7e7e85256aff006d42e0/c76cc222ad5f5c2e852572c80063v653f?OpenDocument.
the officers who serve to protect us.” A 2007 case in Brooklyn, charging three defendants with murdering two police officers, spurred renewed efforts to reinstate the death penalty. In July 2007, the New York State Senate passed legislation establishing the death penalty for first-degree murder where the victim is a police officer, peace officer, or correction officer. The bill provides the jury with sentencing options of death or life imprisonment without parole and a deadlock sentence of life without parole. Senator Joseph Bruno promoted this legislation as a way to “protect our communities, and our police officers, from violent criminals.” But prisoners in New York would actually have to be executed in order for the purported deterrent effect to materialize. A statute that has never been strongly enforced cannot claim to factor into a criminal’s decision of whether or not to commit a crime. If the argument in favor of executing cop killers centers on incapacitation, some argue that life imprisonment is sufficient. Bruno disagrees, citing the murder of ten law enforcement officials within thirty months as proof that “life imprisonment doesn’t work.”

Proving a strong negative correlation between execution and homicide is not easy. For each of the recent studies claiming that executions save lives, there is a study to refute these results.

201. See Press Release, Bruno, supra note 198.
202. Dexter Bostic, Robert Ellis, and Lee Woods were charged in Brooklyn Criminal Court for killing two police officers. See Anthony M. DeStefano, Pair Will Face Court Crowded with Cops, NEWSDAY, July 13, 2007, at A02 [hereinafter DeStefano, Pair Will Face Court].
205. Senate Passes Death Penalty Legislation, supra note 204; see also DeStefano, Pair Will Face Court, supra note 202.
206. Senate Passes Death Penalty Legislation, supra note 204.
208. Id.
The debate about whether capital punishment actually deters homicide is still unresolved. Even Gary Becker, winner of the 1992 Nobel Prize in economics, who believes capital punishment “is worth using for the worst sort of offenses,” admits that “current empirical evidence [is] ‘certainly not decisive.’”

Logic dictates that the greater the punishment the greater its deterrent effect. Accordingly, one might assume that as the most severe of all punishments, death has the greatest success in preventing violent crime. Based on the theory that “as the cost of an activity rises, the amount of that activity will drop,” economists study changes in murder rates within and across states and counties, hoping to determine whether use of the death penalty affects homicide rates. For each inmate executed, such studies claim, five to eighteen homicides are prevented.

Mocan & Gittings, Getting off Death Row; Sunstein & Vermuele, Is Capital Punishment Morally Required?, supra note 197.


211. Liptak, Does Death Penalty Save Lives?, supra note 185.

212. Id.

213. Id.

214. See Mocan & Gittings, Getting off Death Row, supra note 209, at 469 (finding a “significant” correlation between rates of execution, removal, and commutation, and homicide rates. For every execution that occurred, five fewer homicides occurred; for every additional commutation of a death sentence, five more murders occurred; and for each additional removal from death row, one additional murder was committed).

215. See Dezhbaksh, Deterrent Effect, supra note 196, at 344 (finding that “each execution results, on average, in eighteen fewer murders, with a margin of error of plus or minus ten . . . [and] results are not driven by tougher sentencing laws”). The results of this study were challenged as “not credible” by Professors Donohue and Wolters. See Donohue & Wolters, No Evidence for Deterrence, supra note 210, at 2.
Deterrence studies, however, often suffer from failure to isolate effects of execution policy on homicide from other possible reasons for changes in the rate of violent crime.216 Changes in demographics, economic conditions, conviction rates, longer jail sentences, increased imposition of life without parole,217 and harsher prison conditions218 may just as easily deter murder as use of the death penalty.219

Furthermore, statistical findings can be “skewed by data from a few anomalous jurisdictions” like Texas,220 for example, where executions are frequent and occur relatively soon after sentencing.221 Sociologist Richard Berk conducted a nationwide deterrence study working under the premise that data from “outlier” states like Texas, with unusually high execution rates, might influence and overshadow statistical results. Using data from fifty states over a twenty-one year period,222 Berk compared the average number of executions to the average number of homicides.223 By removing outliers like Texas, Berk found that where five or fewer executions occurred, there was no relationship between the execution and homicide rates.224

Another problem in proving deterrence is distinguishing between capital punishment’s effect on premeditated crimes and those that are unplanned and irrational. Deterrence studies are often based on the premise that “a rational offender . . . respond[s] to perceived costs and benefits of committing crime.”225 It is true

216. As Professor Donohue observed in a 2005 critique of modern deterrence studies, “existing estimates contain no (or inadequate) controls for [other] factors [that] might be driving the correlation between homicides and executions.” Donohue & Wolfers, Ethics and Empirics, supra note 210, at 821.

217. See Fagan, Capital Punishment, supra note 210, at 1831 (finding no marginal deterrent effect of the threat of execution compared to the threat of life imprisonment). “Offenders faced with the threat of execution are not substituting less risky varieties of crime for crimes that lead to murder and capital risk, nor are they abandoning the types of crimes that might lead to a capital offense.” Id.

218. See Katz, Prison Conditions, supra note 210, at 321-22, 331 (finding that poor prison conditions deterred crime, but that there was no statistically significant relationship between executions and violent crimes).

219. See Donohue & Wolfers, Ethics and Empirics, supra note 210, at 821; see also Liptak, Does Death Penalty Save Lives?, supra note 185.

220. See Liptak, Does Death Penalty Save Lives?, supra note 185.

221. Id.

222. The period was from 1977 to 1997.

223. Berk, New Claims, supra note 210, at 3 n.4 (finding that in most states the average number of executions fell below five while Texas had a total of twenty-nine, and finding that this disparity would heavily skew the results).

224. Id. at 11-14.

225. Mocan & Gittings, Getting off Death Row, supra note 209, at 454.
that, as the most severe penalty, capital punishment “represents a very high cost for committing murder.” For “rational offenders,” at least, the presence and use of the death penalty in a state should inhibit the commission of death-eligible crimes. Not everyone agrees, however, that potential murderers make these kinds of rational calculations, especially in death penalty states that rarely or never execute. A study by Jeffrey Fagan, Franklin E. Zimring, and Amanda Geller observed no decline in death-eligible homicides relative to non-eligible cases. The authors surmised that many murderers are “present-oriented” and so do not take into account the costs of detection.

On the other hand, studies claim that commuting a death sentence or removing a prisoner from death row decreases criminals’ perceived cost of committing a crime. This study predicts that commutation or removal will result in a corresponding increase in homicides. Thus, in New York, where all seven death sentences imposed under the 1995 statute were overturned, one would expect the homicide rate to increase since prospective murderers would likely see the death penalty statute as ineffective and inconsequential. Instead, homicide has decreased state-wide since New York instituted capital punishment in 1995.

226. Id.
227. Id.
228. Liptak, Does Death Penalty Save Lives?, supra note 185.
229. See Fagan, Capital Punishment, supra note 210, at 1859 (examining homicide rates nationwide since Gregg v. Georgia). The authors expected to find that an increased risk of execution in a death penalty state would lead to a proportionate decrease in death-eligible crimes and no effect on non-eligible crimes. Instead, they consistently found no “marginal deterrent effect of the threat or example of execution on those cases at risk.” Id. at 1860.
230. Id. at 1833.
231. Death sentences are commuted or removed, for example, when an appellate court declares a capital sentence unconstitutional or maintains conviction but overturns a death sentence.
232. Mocan & Gittings, Getting off Death Row, supra note 209, at 21. A study of homicide rates between 1977 and 1997 by Mocan and Gittings analyzed the relationship between execution, removal, and commutation rates of death row prisoners and the rate of homicide. The results showed five additional homicides resulting from each commutation of a death sentence, and one additional homicide for every removal from death row. See supra note 214 and accompanying text.
233. See Mocan & Gittings, Getting off Death Row, supra note 209, at 21.
235. See infra note 236 and accompanying text.
Joseph L. Bruno, New York Senate Majority leader and death penalty advocate, attributes the declining homicide rate in New York over the past decade to the death penalty’s success as a strong deterrent to violent crimes. In support of this cause-and-effect theory, Bruno cites the decline in murders committed in New York, from 1,551 in 1995 to 922 in 2003. But no executions have actually occurred under New York’s 1995 statute. Perhaps Bruno believes that the threat of capital punishment alone is a sufficient deterrent. If so, statistics for New York City undermines his argument. City homicide rates have continued to decline since the 2004 invalidation of the state death penalty statute. The number of recorded homicides in New York City decreased from 2,245 in 1990 to 428 in 2007, and overall crime dropped 6.47% between 2006 and 2007.

Although violent crime has decreased state-wide since the death penalty was enacted in 1995, this trend occurred in areas like Manhattan, where the District Attorney’s Office never even sought the death penalty. In contrast, Monroe County, where prosecutors have sought the death penalty more often than prosecutors in any other New York county, has the highest homicide rate in the State. The uniform decline in crime within the state despite the disparate application of the death penalty indicates the influence of some other method of crime-prevention, such as the increased use of life without parole.

236. See Murphy, Cahill, supra note 113, at 1049 n.79. According to Senator Bruno, since 1995 “[t]he number of violent crimes dropped from 151,731 in 1995 to 89,316 in 2003.” Id. (internal quotation marks omitted).

237. See id.


240. See id. Four hundred twelve were actual murders, sixteen were crime victims who died from injuries sustained. See id.

241. See id. (“[T]he number of rapes, robberies, burglaries, grand larcenies and car thefts are all on the decline.”).

242. See Testimony, supra note 179.

243. The City of Rochester, located in Monroe County, has the highest murder rate in the state. Id.

244. See discussion infra Part II.B.6

2008] NEW YORK’S DEFEATED DEATH PENALTY 1173

In reality, there is simply not enough data to isolate the deterrent effect of capital punishment.246 From a statistical perspective, the low number of executions in the United States in the past two decades are insufficient “to permit strong conclusions” in either direction.247 In fact, states without the death penalty often have lower homicide rates than those states that use capital punishment.248 This empirical controversy remains unsettled; no study is conclusive249 and it seems likely that there will always be “residual uncertainty in social science and legal policy.”250 Moreover, the deterrence argument is theoretical251 in New York where only seven people were sentenced to death under the 1995 statute and no one has been executed.252

4. Incapacitation and the Availability of Life Imprisonment Without Parole

Incapacitation is another goal of capital punishment. Death penalty proponents argue that death is the only way to ensure that our society is forever protected from the most violent criminals. Even prisoners sentenced to life without parole could, at some future point, obtain release either through a change in law or pardon from the governor.253 Also, without the death penalty, some argue, there is no way to stop a prisoner from killing while in jail. If the maximum possible sentence is life without parole, a prisoner serving a life sentence has nothing to lose by killing a fellow prisoner or

246. Liptak, Does Death Penalty Save Lives?, supra note 185.
248. See Testimony, supra note 179 (noting that homicide rates in states with the death penalty are between 48% and 100% higher than in states that do not use the death penalty); see also Shepherd, Deterrence Versus Brutalization, supra note 245, at 205-06 (documenting a “brutalization effect” of executions, observing an increase in homicides shortly after an execution, and finding no deterrent effect on murder rates in eight of the twenty-seven states to execute at least one person between 1977 and 1996, that executions deterred murder in only six of the twenty-seven states, and that murder levels actually increased in thirteen of the states).
249. As Jeffrey Fagan of Columbia University observed in a 2006 article describing flaws in recent deterrence studies, “[t]here is no reliable, scientifically sound evidence that . . . [capital execution] can exert a deterrent effect.” Fagan, Death and Deterrence, supra note 210.
251. See id. at 748 (citing Richard O. Lempert, Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment, 79 MICH. L. REV. 1177, 1192-93 (1981)).
252. See JOSEPH LENTOL ET AL., supra note 19, at 14.
253. See id.
prison employee.\textsuperscript{254} Despite these arguments, many see life without parole as a satisfactory replacement for the death penalty, both in terms of incapacitation and deterrence.\textsuperscript{255}

5. An Expensive System

Both critics and supporters of the death penalty concede that the expenses stemming from a capital prosecution, the trial, appeals process, maintaining a capital defender’s office, housing death row inmates, and the execution itself, are extensive. It is difficult to determine the total cost of capital punishment in New York because no executions have actually taken place under the 1995 death penalty statute.\textsuperscript{256} Nevertheless, between 1995 and 2003, New York State spent over $160 million on processes related to capital punishment, despite the fact that not one execution resulted from this expenditure.\textsuperscript{257}

Evidence shows that life without parole saves money: while capital prosecutions and appeals cost millions of dollars, life imprisonment can cost “less than one million dollars.”\textsuperscript{258} Until the recent reversal of his death sentence, John Taylor was the sole occupant of New York’s death row, located at the Clinton Correctional Facility

\textsuperscript{254} See Furman v. Georgia, 408 U.S. 238, 348 (1972).

\textsuperscript{255} See Hearings, supra note 210 (“[E]xamining declines in homicide rates in . . . New York since [the] state’s peak homicide rate in the early 1990’s, one can see the strong effects of such incapacitative sentences on murder rates. . . . [I]n New York, a state with no death penalty in April 1995 and no executions, homicide rates declined over the next decade by 65.5% since the peak in 1990.”); see also Testimony, supra note 179 (“Social science research indicates that the death penalty does not have an additional deterrent value beyond that of a lengthy prison term.”); Donohue & Wolfsers, Ethics and Empirics, supra note 210; Donohue & Wolfsers, No Evidence for Deterrence, supra note 210; Julian H. Wright, Jr., Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?, 43 VAND. L. REV. 529 (1990) [hereinafter Wright, Life-Without-Parole]; The Right Choice, TIMES UNION (Albany, N.Y.), Jan. 29, 2005, at A6 (noting N.Y. State Assembly Speaker Sheldon Silver’s assertions that a sentence of life imprisonment, rather than death, “ought to be ample punishment for the worst criminals imaginable”).


\textsuperscript{257} See id. (internal citations omitted); see also Testimony, supra note 179 (“After the death penalty was reinstated in New York in 1995, the state spent an estimated $170 million prosecuting a handful of cases.”); Patrick D. Healy, Death Penalty Seems Unlikely to be Revived, N.Y. TIMES, Feb. 11, 2005, at B1 (noting that as of 2005, the total expenditure was estimated at $175 million).

\textsuperscript{258} Wright, Life-Without-Parole, supra note 255, at 558 (“In Florida alone, court costs, attorney’s fees, and incarceration of a death row inmate cost approximately 3.2 million dollars, while the state currently can incarcerate a criminal for life for 700,000 dollars.”).
in Clinton County, which costs about $300,000 per year to maintain.\footnote{259. Stashenko, \textit{Capital Defender}, supra note 4.} The additional costs of capital trials in New York, when compared to non-capital trials, is seen in Queens County, where “capital trials create 300\% to 500\% more work than noncapital trials[,]” and in Kings County, where resources had to be reallocated from prosecutors’ offices of other Boroughs in order to accommodate a capital appeal.\footnote{260. Amanda S. Hitchcock, \textit{Using The Adversarial Process to Limit Arbitrariness in Capital Charging Decisions}, 85 N.C. L. REV. 931, 951 (2007) (citing Ashley Rupp, Note, \textit{Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?}, 71 FORDHAMP L. REV. 2735, 2757 (2003) (noting that the exorbitant cost of capital trials may force counties to choose between these prosecutions and more basic needs like additional law enforcement officers, public nursing positions, and public employee raises)).} Capital punishment advocates, however, claim that economic considerations support reinstating the death penalty.\footnote{261. \textit{See} Joseph Lentol \textit{et al.}, supra note 19, at 27.} The threat of the death penalty as a deterrent to violent crime, in addition to savings procured when “guilty defendants plead guilty to non-capital charges, rather than face . . . a capital trial and possible execution,”\footnote{262. \textit{Id.}} create cost-saving mechanisms that are unique to a death penalty regime.

The nationwide decline in the number of capital cases prosecuted is partly attributable to the great expense.\footnote{263. \textit{See} Tanner, supra note 171.} Georgia recently put seventy-two capital cases on hold because their public defender program did not have adequate funds to conduct a trial.\footnote{264. Tim Jones, \textit{Resistance to Death Penalty Growing: Questions About Justice, Expense Undermining Political Support for Capital Punishment}, CHI. TRIBUNE, Apr. 8, 2007, at 21.} And in October 2007, the New Mexico Supreme Court ordered a stay on a capital case until the legislature could allocate more funding to public defenders.\footnote{265. Scott Sandlin, \textit{Death Penalty out in Guard Killing, Inmates’ Defense Funds Fell Short}, ALBUQUERQUE J., Apr. 4, 2008, at Cl.} Compensation for New Mexico’s state-provided defense counsel was found inadequate to ensure effective representation as required under the Sixth Amendment.\footnote{266. \textit{See id.}}

In addition, expenses resulting from the prosecution of capital cases divert resources from crime prevention efforts, such as law enforcement. For example, Maryland Governor Martin O’Malley, who favors abolishing capital punishment in Maryland, claims re-
placing the death penalty with life without parole would free up $22.4 million. Governor O’Malley stated that this amount could be used to employ “500 additional police officers or provide drug treatment for 10,000” people. O’Malley sees these expenditures as preferable to the death penalty in terms of “saving lives and preventing violent crime.”

Based on a similar analysis, Colorado recently voted on a bill to abolish the death penalty and allocate the money saved from capital prosecution and trials to investigate unsolved murder cases. Proponents of this bill estimate savings of “$2 million a year [currently] spent on prosecuting and defending death penalty cases.” Reallocation of death penalty funds would also reduce the incidence of unsolved murders.

Following this logic, if New York were to repeal its capital punishment statute, it could reallocate funds formerly used to prosecute capital cases to crime prevention programs. Rather than spend taxpayer money on reinstating the death penalty, abolitionists argue that these resources should be used to strengthen police departments, fund crime-prevention programs, and improve crime-detection techniques.

6. Disparate Patterns of Prosecution

New York State prosecutors have complete discretion in deciding when to seek the death penalty. Studies show disparate application of the death penalty, suggesting arbitrary prosecutorial discretion.
decisions based on race, geography, and socio-economic factors. For example, since the reinstatement of the death penalty in 1995, twice as many capital cases could have been prosecuted in Manhattan as in Queens, and yet Manhattan prosecutors have never sought the death penalty, whereas those in Queens have sought death in fourteen percent of death-eligible cases. This is just one example. A variable application of the law can be seen in the erratic prosecutorial statistics across New York’s sixty-two counties. It appears, therefore, that the inclination of individual prosecutors and varying prosecutorial practices between counties create major discrepancies in the application of the death penalty across the state.

Death penalty proponents may say judicial review corrects for any misconduct or that inconsistencies are a necessary byproduct of our democratic system whereby prosecutors are elected and entrusted with pursuing only the most deserving cases. However,
the inconsistent application of the 1995 death penalty law within
the state has led some to question whether a system where the
“happenstance of geography determines whether a defendant lives
or dies at the hands of the state” can be just.283

7. Questions of Innocence

Another argument frequently advanced for abolishing the death
penalty is the risk of executing an innocent person. One hundred
and twenty-three prisoners across the United States were released
from death row between 1973 and 2006,284 with an average nine
years of incarceration before exoneration.285 Yet DNA testing
doesn’t render the criminal justice system foolproof. DNA evi-
dence accounted for only fourteen of these releases.286 In the re-
main ing cases, ultimate exoneration of death-sentenced prisoners
stemmed from other evidence such as confession by the true cul-
prit, the discovery that witness testimony was tainted or perjured,
and forensic evidence such as fingerprinting.287

These facts may potentially cut both ways. For capital punish-
ment supporters, these statistics are evidence that innocence is de-
tected and corrective action taken by the system before it is too
late.288 In fact, death penalty advocates might argue that for the
sake of justice our system must risk occasionally punishing the in-
nocent. Abolitionists, on the other hand, can cite these facts as
evidence that other innocent defendants falsely convicted and sen-
tenced to death were likely never detected. Furthermore, most
would agree that the risk of depriving an innocent person of life
simply in order to execute the guilty is not a legitimate aim, espe-
cially when life imprisonment is an available alternative.

283. Fatally Flawed, supra note 277.
284. Tanner, supra note 171; see also Richard C. Dieter, Death Penalty Info
Ctr., Innocence and the Crisis in the American Death Penalty (2004), http://
www.deathpenaltyinfo.org/article.php?scid=45&did=1149#Sec05b (last visited Sept.
Id.
285. Id.
286. Tanner, supra note 171; see also Dieter, supra note 284.
287. Dieter, supra note 284.
288. Economist Gary S. Becker and Judge Richard A. Posner argue that advances
in DNA identification and lengthy appeals processes protect against the risk of
wrongful execution. See Becker, supra note 197, at 3; Richard A. Posner, The Eco-
NEW YORK’S DEFEATED DEATH PENALTY

8. Methods of Execution

In the past two years, the level of legal scrutiny over lethal injection has increased to the point where the method of execution is arguably the most controversial issue in death penalty debate. In 1977, the Oklahoma state medical examiner suggested an intravenous drip consisting of a lethal combination of chemicals as a more humane method of execution than the electric chair. The Oklahoma Legislature approved the method that year. Since then, thirty-six of the thirty-seven states to reinstate capital punishment since 1976 and the federal government have adopted lethal injection as the primary means of execution.

Since the introduction of lethal injection, courts across the country have heard challenges to the administration, implementation, and risk of error related to this method of execution. On September 25, 2007, the U.S. Supreme Court granted a writ of certiorari in Baze v. Rees, a civil lawsuit filed by Kentucky death row inmates, Ralph Baze and Thomas Clyde Bowling, Jr., challenging Kentucky’s lethal injection process as violating the Eighth Amendment’s prohibition against cruel and unusual punishment. The Baze grant triggered nationwide stays on execution. As of Septem-


290. See Fellner & Tofte, supra note 289; see also Denno, supra note 166, at 65-71.

291. See U.S. Dep’t of Justice, Capital Punishment 1996 Bulletin tbl. 3 (1997), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cp96.pdf. Nebraska was the exception, employing electrocution as the sole means of execution. Although New Jersey abolished its death penalty in 2007, while capital punishment was in effect the state authorized lethal injection. See John Gramlich, Lethal Injection Moratorium Inches Closer, Stateline, Oct. 18, 2007, http://www.stateline.org/live/printable/story?contentId=249581 (last visited Sept. 22, 2008). Executions in New Jersey were put on hold in 2004 by the Appellate Division of New Jersey’s Superior Court, finding that the state’s Department of Corrections must review its lethal injection execution procedures before carrying out any further executions and prove to the Court that these procedures include protocol providing for a method by which to revive a prisoner when an execution goes wrong. See In re Readoption with Amendments of Death Penalty Regulations, 842 A.2d 207, 211 (N.J. Super. Ct. App. Div. 2004).


293. The Baze Petition asserts that the current method of lethal injection used in Kentucky “creates the unnecessary risk of pain and suffering” because of the drugs used and the methods in which these drugs are administered. See Brief for the Petitioners, supra note 289, at 41; see also Death Penalty Info. Ctr., U.S. Supreme Court Decisions: 2007-08 Term, http://www.deathpenaltyinfo.org/article.php?id=2415 (last visited Sept. 22, 2008).
ber 25, 2007, the three-drug protocol at issue in Baze was used to carry out lethal injections in thirty-six of the thirty-seven states that allowed the death penalty. Stays of execution in twelve states, either by governor or court order, were related to lethal injection challenges. But only seven of the twelve state holds were in response to the Baze grant; the other states’ doubts about the three-drug protocol were sufficient to warrant stays even before the Baze grant. The nationwide stays on execution resulted in the longest hiatus on executions since Furman. In 2007, only forty-two executions took place nation-wide, the lowest in over a decade.

On April 16, 2008, the U.S. Supreme Court upheld the ruling of the Supreme Court of Kentucky, finding that neither the risk of improper administration of the drug, nor the state’s failure to adopt purportedly more humane alternatives, rendered the three-

294. The three drugs are sodium thiopental, pancuronium bromide, and potassium chloride. See Brief for the Petitioners, supra note 289, at 4-5. This lethal injection protocol consists of the intravenous injection of three drugs: first, an anesthetic, sodium thiopental, is administered, rendering the inmate unconscious; then, a paralyzing agent, pancuronium bromide; and finally, potassium chloride is injected, which induces cardiac arrest and stops the heart. See Denno, supra note 166, at 55.

295. At the time of the Baze petition, New Jersey was among the thirty-seven states whose death penalty statute provided for the use of the three-drug protocol. The New Jersey death penalty was abolished on December 17, 2007. See supra notes 170 & 291. Until February 2008, Nebraska was the only state in the country to carry out executions solely by the electric chair. See Gramlich, supra note 291. In State v. Mata, the Nebraska Supreme Court held that electrocution violates the state constitution’s prohibition on cruel and unusual punishment. The Court upheld Mata’s death sentence, finding the provision for the method of execution severable from the death penalty statute. Accordingly, Mata’s death sentence is stayed until the state legislature devises a constitutional method of execution. State v. Mata, 745 N.W.2d 229, 261 (Neb. 2008).

296. The twelve states consisted of California, Delaware, Illinois, Maryland, Nebraska, Nevada (whose status was unclear because executions were effectively halted due to the lethal injection issue in Baze v. Rees), New Jersey, New Mexico (whose status was unclear because the State Supreme Court ruled that legislature must allocate more funds for indigent defense in capital cases), New York, North Carolina (whose status was unclear because executions were effectively halted due to the lethal injection issue in Baze v. Rees), Ohio (whose status was unclear because executions were effectively halted due to the lethal injection issue in Baze v. Rees, although one was allowed to proceed), and Tennessee (whose status unclear because executions were effectively halted due to the lethal injection issue in Baze v. Rees, although one was allowed to proceed and one volunteer execution was allowed). See DEATH PENALTY INFO. CTR., DEATH PENALTY IN FLUX, http://www.deathpenaltyinfo.org/article.php?did=2289 (last visited Sept. 22, 2008); see also Gramlich, supra note 291.

297. Gramlich, supra note 291; see also Tanner, supra note 171.


drug protocol used for lethal injection by Kentucky cruel and unusual punishment.\textsuperscript{300}

III. RECOMMENDATION: ACTIONS SPEAK LOUDER THAN WORDS

This section evaluates the options of amending or abolishing the New York death penalty. The status quo is not acceptable. Not only should legislation reflect public opinion, but for practical purposes, the legislature must not allow the death penalty statute to remain a nullity. The current political debate over capital punishment shows greater support for abolition and more reasons to abolish than amend New York’s death penalty statute. This Note therefore recommends that the legislature act to abolish the death penalty. If the majority of citizens decides that capital punishment is still desirable, however, that decision must be reflected in functioning state legislation.

A. Consequences of Inaction

The challenge of crafting a statute that will satisfy the Court of Appeals’ exacting standards of due process is burdensome.\textsuperscript{301} Inaction might appeal to members of the New York Legislature who oppose resurrecting the death penalty but do not want to deal with the backlash they might face by attempting to definitively repeal the statute. If the Legislature is truly divided on this policy issue, efforts to abolish may not seem worthwhile. There are, however, considerations that make it critical for the Legislature to ensure that whether New York has or does not have a death penalty is the decision of the legislature and not simply the result of judicial review.

B. The Role of the Legislature

First, it is the legislature’s job, not that of the court, to decide public policy.\textsuperscript{302} In finding CPL section 400.27(10) unconstitutional

\textsuperscript{300} Baze v. Rees, 128 S. Ct. 1520 (2008).

\textsuperscript{301} In fact, continuation of the status quo is certainly a possibility and may be the most likely prediction for New York, at least for the near future. Assemblyman Joseph Lentol predicts “there will never be an Assembly floor vote on this issue [of reinstating the death penalty] . . . if we did anything, it would be nothing, and that would kill the death penalty.” Healy, \textit{supra} note 257. Further, according to Assemblyman Ron Canestrari “[a] moratorium on the death penalty, or doing nothing to restore it, seems the best way to go.” \textit{Id.}

\textsuperscript{302} See Gregg v. Georgia, 428 U.S. 153, 175 (1976) (“Courts . . . . are not designed to be a good reflex of a democratic society. . . . Their essential quality is detachment,
tional, the Court of Appeals did not find capital punishment un-
constitutional per se. The LaValle Court simply held that because
one part of the statute, the deadlock provision, is unconstitutional
and cannot be severed from the whole, the legislature must enact
an amended version in order for the death penalty statute to
function.303

The situation in New York created by the death penalty statute’s
invalidation is not very different from that of abolition: death row
is closed, the Capital Defender Office is closed, and life without
parole is the maximum permissible sentence for a prisoner con-
victed of first-degree murder.304 There are, however, two critical
reasons that the status quo cannot continue.

C. Practical Consequences of Maintaining the Status Quo

1. Overruling LaValle

First, the Court of Appeals could ultimately gain enough new
members to overrule the LaValle decision. If so, the death penalty
would suddenly return to force in New York State. Now is the time
to decide what the public wants. Rather than simply defer to judi-
cial decisions, the legislature must react. If social values have
evolved to the point that the death penalty is no longer acceptable
to the public, the law should reflect this.

2. The Role of Consensus in Supreme Court Jurisprudence

The second practical consideration mandating legislative action
is the role of consensus in U.S. Supreme Court jurisprudence. The
Eighth Amendment is based on “evolving standards of decency
that mark the progress of a maturing society.”305 For Eighth
Amendment purposes, the Supreme Court sees state legislation as
the “clearest and most reliable objective” indication of these stan-
dards.306 To determine whether the Eighth Amendment prohibits
a certain practice, the Supreme Court often looks to state legisla-
tion to see whether a majority consensus about that practice has
developed among the states.307

304. See supra Part II.B.
86, 100-01 (1958)).
306. Id. (quoting Penry v. Lynaugh, 492 U.S. 301, 331 (1989)).
307. Id. at 313.
Even though New York does not currently have a functioning death penalty statute, for purposes of Eighth Amendment jurisprudence, the Supreme Court might still examine the New York statute for an indication of political will. In fact, the Court might rest any determination of consensus on state legislation, reasoning that the Legislature did not enact a new law because public opinion did not warrant new legislation. Unfortunately, the statute on the books in New York State no longer reflects a democratic consensus. In order for the Supreme Court to defer to the judgment of the New York Legislature, as reflected in state legislation, that judgment should be premised on reasoned deliberation and transparency. With regard to New York’s death penalty statute, this is currently not the case.

D. Best Option for Amendment

It may be that the LaValle Court’s imposition of a death penalty moratorium reflects the popular will. If that is the case, and the people of New York no longer support the death penalty, then the Legislature must act to abolish this law. If, on the other hand, amendment is desirable, of the four options for amendment discussed above, Option 1 is most likely to receive approval from the Court of Appeals. First of all, this is the approach indicated by members of the court on at least three occasions. Allowing a capital jury to deliberate on two sentences, death and life without parole, and instructing the jury that upon deadlock the defendant will be sentenced to life without parole, is neither coercive, nor unjust. In New York, the capital trial can be seen as the government’s case to win or lose. If the government cannot convince all twelve jurors that death is appropriate, it has lost its case, and so the death penalty may not be used. Deadlock means that the jurors who voted for death rejected life without parole as too lenient, and those who voted for life without parole rejected death as too harsh. No juror rejected life without parole as too harsh.

The other three options discussed in Part II.A.2 are less likely to be approved by the Court of Appeals. Although Option 2 improves upon CPL section 400.27(10) by allowing the jury to con-
sider a parole-eligible sentence, it remains coercive because it presents the danger that members of a potentially deadlocked jury will vote for death in order to prevent the defendant’s parole eligibility. Whereas Option 3 discards CPL section 400.27(10)’s coercive parole-eligible deadlock sentence, it creates due process issues by imposing life without parole upon deadlock even where most jurors find sufficient mitigating circumstances to warrant a parole-eligible sentence. Although Option 4 does not allow jurors to impose a death sentence without unanimous agreement, the Court of Appeals might find that the heightened need for reliability in a capital case mandates against a sentencing scheme that allows a deadlock sentence to be determined based on a non-unanimous jury vote. While no deadlock instruction should coerce a juror’s vote, Option 4 goes too far in the opposite direction by increasing the likelihood of and even encouraging jury deadlock.

New York places importance on giving the defendant the benefit of the doubt, minimizing jury speculation and maximizing the jury’s role in fashioning a sentence which is individualized and fair. Option 1 provides an optimal mix of these considerations by imposing the least severe sentence considered and encouraging the jury to reach a unanimous verdict without fear of deadlock.

E. Abolition is Preferable to Amendment

The public hearings following the LaValle decision revealed a general unwillingness to reinstate the death penalty in New York. The costs of time and money in administering capital punishment seen in New York and nationwide seem too great, especially given the viability of life without parole as a replacement for capital punishment. The following sections argue that abolishing the death penalty in New York is preferable to amending the statute.

1. Life Without Parole

In debates over the efficacy, efficiency, and expedience of capital punishment, life without parole consistently emerges as a “legitimate alternative to capital punishment embraced by either end of

313. See supra Part II.A.2.c
314. See supra Part II.A.2.d
315. See supra Part II.A.1.
316. See supra Part I.F.
317. See supra Part II.B.5.
the political spectrum. For death penalty opponents, life without parole achieves the same goals as capital punishment, namely deterrence and incapacitation. Death penalty advocates may also accept life without parole as a satisfactory alternative to capital punishment. Life without parole arguably serves as a marginal deterrent to violent crime. Also, life imprisonment is less expensive than the trial and appeals processes involved in capital punishment. Most importantly, life without parole allows the permanent incapacitation of the most dangerous criminals, but can be reversed if a defendant is later proved innocent.

2. The Federal Prosecution Loophole

While discussion of the federal death penalty is beyond the scope of this paper, the prosecution of capital cases at the federal level in New York influences the debate as to what action to take regarding the New York State death penalty. Assuming that the public continues to support the death penalty for certain crimes, the possibility that such crimes will be prosecuted and the death penalty sought at the federal level may be an adequate alternative to a state capital punishment statute. State prosecutors could, in certain cases, cede jurisdiction to federal prosecutors who are authorized to seek capital punishment. Federal prosecution might be seen by law-enforcers, politicians, and the public alike as an adequate remedy where they feel that the offender deserves the ultimate punishment of death.

318. Wright, Life-Without-Parole, supra note 255, at 533.
319. See supra note 255 and accompanying text.
320. Cf. supra note 217.
321. See supra Part II.B.5.
322. Wright, Life-Without-Parole, supra note 255, at 557.
323. Id. at 558.
ceding cases to federal prosecutors in order to “achieve a specific result.”325 Furthermore, the death penalty is rarely imposed by federal juries in capital cases in New York.326

3. Public Opinion

In discussing the form an amended statute could take, it is important to remember that reinstating the death penalty is contingent on support from both the legislature and the public.327 The future of capital punishment in New York thus turns on the will of the legislature and, more generally, the will of the people. Reports on public opinion and the relevant votes of the senate and assembly on this issue suggest that today it is unlikely that legislation to amend the death penalty could gain enough votes to reinstate the death penalty.

Public opinion has changed since 1995. The New York Assembly Codes Committee’s report on the 2004-2005 public hearings about New York’s death penalty revealed that many of the witnesses who testified “favored non-restoration or outright abolishment of the death penalty in New York.”328 This finding is consistent with a public opinion poll published by the New York Times in February 2005 which reflected a decline in public support for capital punishment:

Fifty-six percent of registered voters surveyed said they preferred either life in prison without parole or life in prison with the possibility of parole over the death penalty for people convicted of murder. Only 34 percent said they supported the death penalty, a significant drop from the 47 percent who supported it in 1994 when Mr. Pataki made instituting the death penalty a


325. Annese, supra note 204. As former District Attorney William L. Murphy said: “We have to operate under the laws within the state of New York.” Id.

326. See Schindler, supra note 324 (“In the 13 death eligible cases where a Federal jury in New York convicted the defendant, the jury refused to vote for a death sentence.”).

327. See Zimet, Valid Deadlock Instruction, supra note 128.

328. Murphy, Cahill, supra note 113, at 1049; see generally Joseph Lentol et al., supra note 19.
critical component of his successful drive to unseat Gov. Mario M. Cuomo.329

More recently a 2006 poll showed that fifty-three percent of New Yorkers said they preferred life without parole, while thirty-eight percent supported the death penalty in first degree murder cases.330

4. Legislative Will

The change in public support for the death penalty is reflected within the legislature. It is important to look to the actions taken by the state legislature, which the Supreme Court upholds as “the best objective indicia of public attitude.”331 Although public opinion polls can be useful, their conclusions can be easily misconstrued and altered depending on the questions selected, the form of these questions, the method of participant selection, the sample size, and other factors. The acts of our democratically elected representatives express the “will and consequently the moral values of the people.”332

Just as public support for the death penalty has changed since 1995, so has opinion shifted within the legislature. Several members of the New York State Legislature who once supported the passage of a death penalty law in New York have since reconsidered their positions. For example, New York State Assemblywoman Helen E. Weinstein, who was elected to the New York Assembly in 1980 as a death penalty proponent and who voted to enact the death penalty in 1995, decided not to support reenacting the death penalty after the LaValle decision. Weinstein reasoned “you cannot draft a death penalty law that does not have the possibility of convicting someone who is innocent.”333 Similarly, Assemblyman Joseph Lentol, who is chairman of the Assembly’s Codes Committee that held public death penalty hearings in 2004 and 2005, also reversed his previous support for capital punishment.334 Lentol, like Weinstein, concluded that the death penalty is too

329. Slackman & Connelly, supra note 116 (“The poll, of 1,822 people . . . had a margin of sampling error of plus or minus three percentage points and surveyed 1,481 people who said they were registered to vote.”).


331. Proctor, Reevaluating, supra note 176, at 229-30.


334. Stashenko, supra note 108.
flawed: “I thought of the law as majestic and that there was very little chance of a mistake . . . . [b]ut I’ve come to realize that no one’s perfect, including judges and juries.” According to Assemblyman Ron Canestrari of Albany County, who has also withdrawn his support for the 1995 death penalty statute, “there’s very little evidence the death penalty has helped New York these 10 years.” There seems to be a consensus, at least among members of the assembly, that whatever purposes the death penalty was supposed to serve, they are not served by the current system.

**Conclusion**

The Supreme Court has ruled that capital punishment is not an intrinsic violation of the Eighth Amendment’s ban on cruel and unusual punishment. Given that the death penalty is not per se unconstitutional, the decision to have a death penalty rests with the legislature. The Supreme Court has recognized that “the constitutional test [of a capital punishment statute] is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards.” Accordingly, it is a legislature’s responsibility to pass laws that “respond to the will and . . . the moral values of the people.” In New York, votes in the legislature about the death penalty are often close, reflecting the closely divided opinion of the public. Shifting positions taken by the state legislature mirror shifting public views. The state legislature is in the best position to communicate its citizens’ determination as to the future of capital punishment in New York.

The United States legislative system’s assignment of this responsibility to its political representatives has been identified as the method most likely to result in laws that express the will of the electorate. The Supreme Court therefore “relies on legislative acts

336. Healy, supra note 257.
337. The Supreme Court has consistently held that capital punishment is not in itself a violation of the Eighth and Fourteenth Amendment, but that certain applications of the death penalty have been. In **Gregg v. Georgia**, the Court upheld capital punishment and refused to hold that it is per se “cruel and unusual punishment,” effectively ending the debate, started just four years earlier in **Furman v. Georgia**, as to capital punishment’s constitutionality under the Eighth Amendment. See **Gregg**, 428 U.S. at 153; **Furman**, 408 U.S. at 238.
338. **Gregg**, 428 U.S. at 175.
339. **Id**.
340. See discussion supra Part III.C.2.
... when it attempts to gauge American public opinion about the death penalty.”

Given the complex mixture of morals, ethics, questions of effectiveness, questions of equal protection, questions of spending on the death penalty versus spending on prevention, and the intricate swirl of conflicting emotions and personal convictions about this difficult and contentious subject, abolishing the death penalty seems most appropriate. New York’s death penalty statute, CPL section 400.27, rendered inoperable by the Court of Appeals, no longer reflects the results of a reasoned democratic consensus. If capital punishment is no longer a desirable or practical option for New York, the legislature must act to affirmatively abolish the statute.

As Judge Smith observed in his Taylor concurrence, by acting to either amend or repeal the death penalty statute, the legislature “would bring the capital punishment issue back into the realm of democratic decision-making, where it belongs.” This decision should reside with the legislature.

341. Proctor, Reevaluating, supra note 176, at 213 n.16 (“Although poll results are closer to the primary source and thus intuitively reliable, the Court identifies legislative acts as the most objective, dependable indicator of national consensus.”).
